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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 845

YOGURT MASTER, INC., PETITIONER

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-27) is reported at 310 F.2d 53. The district court's findings and conclusions (Pet. App. 28-33) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1962. The petition for a writ of

certiorari was filed on February 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether both courts below correctly held that the operations of petitioner in producing yogurt and sour cream were not the "first processing" of skimmed milk into dairy products within the exemption for such processing in Section 7(c) of the Fair Labor Standards Act.

STATUTE INVOLVED

Section 7 of the Fair Labor Standards Act, as amended, 52 Stat. 1060, 63 Stat. 910, 29 U.S.C. 201, *et seq.*),[1] provides in pertinent part:

> Section 7(a):
>
> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; * * *.

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[1] None of the changes in these provisions made by the Fair Labor Standards Amendments of 1961 (75 Stat. 65) affects the issues in this case.

Section 7(c):

In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provision of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Secretary), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

STATEMENT

The Secretary of Labor brought this action to enjoin petitioner from violating the overtime, recordkeeping, and shipping provisions of the Fair Labor Standards Act (Pet. App. 28). Petitioner conceded that it was not complying with those provisions, but contended that it is not subject to them by virtue of the exemption granted in Section 7(c) to employers "engaged in the first processing of milk, buttermilk,

whey, skimmed milk, or cream into dairy products" (Pet. 4).

Petitioner is engaged in Florida in producing yogurt and sour cream for regular sale outside the state. In making these products, it uses an ingredient called "condensed skim milk (36% non-fat solids)." This ingredient constitutes 25 percent of the yogurt, and 15 percent of the sour cream (Fdg. 6, Pet. App. 30).

Petitioner purchases the condensed skim milk principally from a dairy products company in Tampa, Florida, whose source is a plant in Turtle Lake, Wisconsin. The Turtle Lake company processes fresh whole milk to produce cream and skimmed milk, the latter having a 9 percent concentration of non-fat solids. To produce the condensed skim milk, the Turtle Lake plant uses skimmed milk obtained by the first operation and processes it further by heating it to a predetermined temperature, running it into a condenser, and subjecting it to various combinations of temperature and pressure (Fdg. 6, Pet. App. 31).

The trial court held that since "substantial portions of the ingredients used by [petitioner] in its products had in fact been processed elsewhere [*i.e.*, at Turtle Lake] by other parties, before [petitioner's] production began," petitioner had failed to show that it was "engaged in the first, and not some subsequent, processing of the products named in the exemption" (Concl. 3, Pet. App. 32), and granted an injunction (Pet. App. 33-34). The court of appeals unanimously affirmed, holding that the skimmed milk used by the petitioner "has been processed in Wisconsin before be-

ing shipped to Florida" and that "[t]he first processing ended, if not in Wisconsin, at least upon arrival in Florida" (Pet. App. 27).

ARGUMENT

This case presents only the narrow question whether the particular operations conducted by petitioner in producing yogurt and sour cream from skimmed milk constituted the "first processing" of such milk as that term is used in Section 7(c) of the Fair Labor Standards Act. The ruling of both courts below that petitioner's operations went beyond the "first processing" is correct; it is not in conflict with any other decisions; and it turns essentially on the facts of this particular case.

Petitioner's argument (Pet. 9-14) is in substance that the prior processing of the skimmed milk at Turtle Lake was not its "first processing" because (1) "only heat is mechanically applied to the skimmed milk," and (2) the processing merely separates the components of the skimmed milk but does not convert it into a "non-perishable salable product." But there is nothing in either the text or legislative history of the Act to suggest that the term "first processing" has a fixed meaning limited to particular kinds of physical procedures or to activities which result in the production of nonperishable dairy products. On the contrary, the point at which the "first" processing ends and the "subsequent" processing begins necessarily varies from product to product, from plant to plant, and from industry to industry. And, in deter-

mining whether particular activities constitute the "first processing" of a particular product, "these exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit" (*Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392).

The various processes by which the Turtle Lake plant converted ordinary skimmed milk into condensed skim milk (see the Statement, *supra*, p. 4) constituted the first processing of the skimmed milk into dairy products. The district court correctly ruled that petitioner's operations in converting the condensed skim milk into yogurt and sour cream constituted not the "first" but "some subsequent" processing of the product. "The term 'first processing' of milk, whey, skimmed milk, or cream as used in Section 7(c) of the Act does not include * * * operations in which products which have been subjected to 'first processing' within the meaning of the exemption are further processed" (*Walling* v. *Bridgeman-Russell Co.*, 2 WH Cases 785, 789-790, 6 Lab. Cases (CCH) ¶ 61,422 (D.Minn., 1942, not officially reported)).

The legislative history is fully consistent with the lower courts' conclusion that "first processing" does not extend to the subsequent processing of a dairy product, already processed by its producer, in order to convert it into a different product. During the Congressional debates on the legislation, the present language of Section 7(c) was adopted in preference to a provision for a general overtime exemption for "industries engaged in producing, processing, distribut-

ing or handling dairy products" (83 Cong.Rec. 7419, 7421, 7423).[2] The purpose of this narrower exemption was to accomodate the need for "facilities and employment schedules adequate to handle milk and cream of continuously varying volume" resulting from daily and seasonal fluctuations in the quantity of milk received from the farm.[3] Petitioner's operations do not involve the adaptation of facilities and schedules to a fluctuating volume of farm products, since petitioner purchases condensed skim milk from a wholesaler at times and in amounts dictated by its own convenience.

None of the cases upon which petitioner relies is in point. Four of them involved not the exemption for first processing of milk into dairy products, but that for the "first processing of * * * perishable or season-

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[2] The statement of Congressman Beiter (Pet. 15) that he believed that "first processing" would "include casein and dried milk" appears to refer to the making of those products as a "first processing" of milk rather than to subsequent operations upon those products. Cf. *McComb* v. *Hunt Foods*, 167 F.2d 905, 906-907 (C.A. 9), certiorari denied, 335 U.S. 845; *Hendricks* v. *Di Giorgio Fruit Corporation*, 49 F.Supp. 573, 575 (N.D. Cal.).

[3] Statement of Ernest H. Daniel, Chairman, Dairy Industry Committee, Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S.2175 and H.R. 7200, 75th Cong., 1st Sess., p. 1206; see also statement by Representative Biermann, 83 Cong.Rec. 7325-7326; statement of National Cooperative Milk Producers Federation, Hearings before the House Committee on Education and Labor on H.R. 2033, 81st Cong., 1st Sess., p. 1706, and Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare on S. 58, etc., 81st Cong., 1st Sess., p. 1197.

al fresh fruits or vegetables."[4] In each of those cases, the employer concededly was engaged in the "first processing" of perishable fruits or vegetables, and the question was at what point *his* operations ceased to be "first processing". The exemption was held applicable to all the various steps taken as part of a single continuous process by which the products were brought to a non-perishable or marketable state.[5] Petitioner, however, is not engaged in a continuous process beginning with the original skimmed milk, but starts out with a marketable and marketed com-

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[4] *Mitchell* v. *Oregon Frozen Foods Company*, 251 F.2d 116, (C.A. 9), rehearing denied, 264 F.2d 599, certiorari granted, 359 U.S. 958, certiorari dismissed, 361 U.S. 231; *McComb* v. *Hunt Foods, supra; McComb* v. *C. H. Musselman Company*, 74 F.Supp. 185 (M.D. Pa.), affirmed, 167 F.2d 918 (C.A. 3); and *Hendricks* v. *Di Giorgio Fruit Corporation, supra.*

[5] In *Hendricks*, the employer was engaged in crushing grapes, fermenting the juice, and making brandy and wine, all as part of "a continuous processing of the fresh grapes that cannot be halted at any point prior to completion" (49 F.Supp. at 576). In *Hunt Foods*, the court found that "[t]he dehydrating, and making of juice and pomace are all part and parcel of the speedy and *continuous* process of converting the perishable apple into a non-perishable salable product" (167 F.2d at 907; emphasis added). In *Oregon Frozen Foods*, where the employer froze fresh vegetables and packed them in bulk for temporary storage, it was held that repacking them for sale in consumer-size packages was not a "new process". 145 F.Supp. 157. In *Musselman Company*, where the apples moved through a cannery on a "production line", 167 F.2d at 918, through several processes ending with the pulping of cores and peels and the drying of the pulp into pomace, it was held that the entire "journey" through the plant was "first processing," including the final drying of the pulp. *Id.* at 919.

mercial product, the "condensed skim milk (36% non-fat solids)," which it then subjects to additional processing to convert it to its own products, yogurt and sour cream.

The fifth case, *Sugar Creek Creamery* v. *Walker*, 208 Ark. 639, 187 S.W.2d 178, held that "flash pasteurization" of milk by the employer as a step in his own production of butter and cheese, did not complete "first processing." The court carefully pointed out that if the employer had been engaged in "the pasteurization of raw milk into commercial pasteurized milk for resale as such, then pasteurization in itself would be the first processing." 208 Ark. at 642, 187 S.W. 2d at 179. Cf. *Walling* v. *Bridgeman-Russell Co.*, *supra*, where the exemption was held inapplicable to an employer who used condensed milk in manufacturing ice cream.